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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

JULIO CESAR OCHOA,

Defendant and Appellant.

B290628

(Los Angeles County
Super. Ct. No. TA099023)

APPEAL from an order of the Superior Court of Los Angeles County, John J. Lonergan, Jr., Judge. Affirmed.

Julio Cesar Ochoa, in pro. per; Ava R. Stralla, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

INTRODUCTION

Defendant and appellant Julio Cesar Ochoa appeals from a postjudgment order denying his request to withdraw his no contest plea to one count of robbery and his admission of gun and gang enhancements. We appointed counsel to represent Ochoa on appeal. Appellant's appointed counsel filed an opening brief in accordance with *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*), asking this court to conduct an independent review of the record to determine if there are any arguable issues on appeal. At our invitation, appellant filed his own letter brief, raising several issues. We augmented the appellate record to include an amended abstract of judgment, filed September 13, 2018.

We have conducted an independent examination of the entire record pursuant to *Wende, supra*, 25 Cal.3d 436 and have reviewed appellant's contentions. We conclude no arguable issues exist. Accordingly, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant and a co-defendant were initially charged with attempted murder and attempted robbery, arising out of a gang confrontation during which appellant shot the victim multiple times in the torso. The victim survived.

On November 4, 2009, appellant entered into a negotiated plea. In exchange for a 30-year sentence, dismissal of the original charges, and a guaranteed concurrent sentence on unrelated pending felony charges against him, appellant pleaded no contest to one count of robbery (Pen. Code, § 211)¹ and admitted that he personally and intentionally discharged a firearm in the commission of the offense (§ 12022.53, subd. (c))

¹ All statutory citations are to the Penal Code.

and acted for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)(1)(B)).

On the record, the trial court sentenced appellant in accordance with the parties' agreement. Appellant was sentenced to the high term of five years for the robbery, "plus 20 years on the gun enhancement under [section] 12022.53[, subdivision] (c). That's a full, separate, and consecutive sentence. And, additionally, there's a five-year, full, separate, and consecutive sentence . . . under the gang enhancement, [section] 186.22[, subdivision] (b)(1)(B), for a total of 30 years."

Court minutes tracked the announced sentence in all respects, save one: Instead of recording that the five-year gang enhancement was imposed pursuant to section 186.22, subdivision (b)(1)(B), the minutes indicated the enhancement was based on section 186.22, subdivision (b)(1)(C).² The original abstract of judgment was consistent with the court minutes, but not with the trial court's announced sentence. Defendant did not appeal.

Eight years later, in November 2017, an analyst with the California Department of Corrections and Rehabilitation (CDCR)

² Section 186.22, subdivision (b)(1)(B) provides for a five-year gang enhancement if the underlying felony is a serious felony "as defined in subdivision (c) of Section 1192.7." Serious felonies enumerated in section 1192.7, subdivision (c) include "(8) . . . any felony in which the defendant personally uses a firearm . . . [and] (19) robbery." Section 186.22, subdivision (b)(1)(C) requires a 10-year enhancement if the felony is a violent felony. Robbery is "both a serious and violent felony. (Pen. Code, §§ 667.5, subd. (c)(9); 1192.7, subd. (c)(19).)" (*People v. Jenkins* (2006) 140 Cal.App.4th 805, 810.)

wrote to the trial judge and trial counsel and advised a section 186.22, subdivision (b)(1)(C) gang enhancement requires a 10-year, not a five-year, sentence. The CDCR asked for clarification. Taking the position the agreed-upon sentence was unauthorized, the prosecutor entered into unsuccessful negotiations with appellant's trial counsel to revamp the plea deal.

Finally, appellant moved to withdraw his plea, arguing the trial court imposed an unauthorized sentence. The trial court (a different judge than the one who accepted appellant's plea and imposed the sentence) conducted a hearing. Acknowledging the five-year gang enhancement was imposed pursuant to section 186.22, subdivision (b)(1)(B), the trial court mistakenly advised counsel that provision requires a 10-year enhancement. (See fn. 2.) Nonetheless, the trial court denied appellant's motion to withdraw his plea and held the negotiated 30-year sentence would stand.

Appellant timely appealed from the order denying his motion to withdraw the plea. He did not obtain a certificate of probable cause. After the notice of appeal was filed, but before appointed counsel filed the *Wende* brief, the trial court amended the abstract of judgment to accurately reflect the five-year enhancement was imposed pursuant to section 186.22, subdivision (b)(1)(B).

DISCUSSION

After appointed counsel filed a *Wende* brief, appellant filed his own brief with this court. Appellant argued his negotiated sentence was illegal and his appointed trial counsel provided ineffective assistance years earlier by recommending an illegal plea bargain.

As noted, appellant did not appeal from the judgment entered eight years ago. Even if timely now, appellant's issues would require a certificate of probable cause. (§ 1237.5.) As the Court of Appeal explained in *People v. Hurlic* (2018) 25 Cal.App.5th 50, there is a distinction on appeal "between pleas in which the parties agree that the court will impose a specific, agreed-upon sentence, and pleas in which the parties agree that the court may impose any sentence at or below an agreed-upon maximum. A certificate of probable cause is required for the former [citations], but not the latter This differential treatment flows directly from the substance of the parties' agreement: Where the parties agree to a specific sentence, the court's '[a]cceptance of the agreement binds the court and the parties to the agreement' [citation], and a defendant's challenge to the specific sentence is '*in substance* a challenge to the validity of the plea' [citation]. . . . Because the parties in this case agreed to a specific . . . prison sentence, . . . appellate review is permissible only if defendant first obtains a certificate of probable cause." (*Id.* at pp. 55-56.)

The specific prison sentence appellant received was integral to the negotiated plea. The issues appellant asks this court to consider are "in substance" challenges to the validity of the plea. Even were we to assume appellant's challenge is timely, his failure to obtain a certificate of probable cause precludes appellate review of the issues he raised. (*People v. Hurlic, supra*, 25 Cal.App.5th at pp. 55-56.)

In any event, appellant's negotiated sentence was authorized, and appellant's trial counsel did not provide ineffective representation in recommending the plea bargain. Having reviewed the record as a whole and considering the

circumstances of this case, we hold the reporter’s transcript of appellant’s sentencing hearing controls over the clerk’s minutes. (*People v. Beltran* (2013) 56 Cal.4th 935, 945, fn. 7.) Robbery is a serious felony. When a robbery is committed for the benefit of, at the direction of, or in association with a criminal street gang, a five-year enhancement pursuant to section 186.22, subdivision (b)(1)(B) is authorized. The abstract of judgment has been amended to accurately reflect that the sentence enhancement was imposed pursuant to this statutory provision. The trial court’s mistaken advisement that a section 186.22, subdivision (b)(1)(B) enhancement results in a 10-year sentence is of no moment. As one Court of Appeal explained decades ago, “sentencing statutes are mind-numbingly complicated, and by virtue of continued legislative tinkering, not likely to soon become any easier to apply.” (*People v. Reyes* (1989) 212 Cal.App.3d 852, 858.)

We have examined the entire record and are satisfied no arguable issues exist in the appeal before us. (*Smith v. Robbins* (2000) 528 U.S. 259, 278; *People v. Kelly* (2006) 40 Cal.4th 106, 111; *Wende, supra*, 25 Cal.3d at p. 443.) The *Wende* brief filed by appellate counsel satisfies her obligation to represent defendant on an appeal. (*Smith v. Robbins, supra*, at pp. 277-278.)

DISPOSITION

The judgment is affirmed.

DUNNING, J.*

We concur:

MANELLA, P. J.

WILLHITE, J.

* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.